In the Matter of

HARRY PETIT,
Complainant,

v.

DATE: April 27, 2000

AMERICAN CONCRETE PRODUCTS, INCORPORATED,
Respondent.

CASE NO.: 1999-STA-47

Appearances: Neil A. Barrick, Esq.
For Complainant

Denis Y. Reed, Esq.
For Employer

Before: JOHN C. HOLMES
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER

This proceeding arises under the "whistleblower" employee protection provisions of § 405 of the Surface Transportation Assistance Act of 1982 ("the Act" or "STAA"), 49 U.S.C. § 31105 (formerly 49 U.S.C. § 2305), as amended, and the applicable regulations at 29 C.F.R. § 1978. The Act protects employees who report violations of commercial motor vehicle safety rules or who refuse to operate vehicles in violation of those rules. A hearing was held in Des Moines, Iowa, on November 15, 1999. My Recommended Decision and Order is based upon the entire record.

## Background and History

The parties have agreed that the facts recited in the Secretary's Findings and Preliminary Order are accurate, although no formal stipulation has been entered into. (T 10-11).

In mid-March, 1999, Respondent American Concrete Products, Incorporated ("American" or "Respondent"), hired Mr. Harry Petit ("Complainant") as a truck driver in its material hauling business. On March 23, 1999, Mr. Petit was assigned to drive Truck 215, a belly dumper used to haul sand and gravel from quarries to plants. He had previously been driving an equipment hauler, but had his assignment switched by American's dispatcher, Mr. Tucker.

Upon taking possession of Truck 215, the Complainant alleges that the previous driver, Mr. Boyd Owen, informed him of a number of problems with the truck, and that upon operation thereof he discovered others. These included inoperable speedometer and tachometer, an unmounted fire extinguisher, a gearshift boot replaced by an old shirt, worn seats, weak brakes, faulty turn signals, non-working heat and air-conditioning, and general dirt. Mr. Petit drove the truck from the North Plant in Johnston, Iowa to Ames, Iowa and back again.

When he returned to the Johnston location, it is agreed that Complainant orally reported to Mr. Jeff Tucker, the dispatcher, that there were safety problems with the truck, and also that he spoke with the head mechanic, Mr. Terry Thomas, regarding the problems. Mr. Petit did not file a written report of any kind with American. It is also apparent that the Complainant did not detail each and every problem he found to either gentleman he spoke with; instead, the brake problem was pointed out, and the truck was generally referred to as "junk." (T 139). He refused to drive the truck due to safety concerns. This report occurred late in the afternoon on March 23, 1999, and so the Complainant was sent home for the day. No other vehicles were available for him to drive at that time, as he had requested.

At approximately 6 a.m. the next morning, following instructions he had received from his training driver, Mr. Petit called into the dispatcher, Mr. Tucker, to ask if there was work for him. It is undisputed that Mr. Petit refused to drive Truck 215 in its present condition. He alleges that he was told that he either had to drive the truck or seek another job, as no other trucks were available. Mr. Tucker maintains that, while it is true that no other trucks were available, American asked if Complainant would drive Truck 215 after it was repaired. It is alleged that Mr. Petit refused; for his part, the Complainant says that he would have agreed to drive the truck if it was repaired to his "specifications."

At this point, Mr. Petit considered himself fired. American did not. However, a few hours later, at approximately 10 a.m., the Complainant called American and spoke to Mr. Dan Jungbluth, the company's personnel and safety director. Mr. Jungbluth is the individual who hired Mr. Petit. The Complainant's purpose in making the call was to inform Mr. Jungbluth of his opinion of American. He informed the personnel director of his safety complaints; Mr. Jungbluth reported that he asked the Complainant if he was refusing to drive Truck 215 absolutely, or if he would drive it if it was repaired. According to American, Mr. Petit required that the truck be brought "back up to new" before he would drive it again. Mr. Jungbluth concluded at this time that Mr. Petit had quit his job, and therefore dismissed him.

Truck 215 was never repaired, nor was it driven again by anyone. On April 15, Truck 215 was traded in by American for a new vehicle; S 14,000 was obtained for it. It is undisputed that the truck was the oldest belly dumper in American's fleet, although there were older trucks of other types; it had been purchased used in 1995.

On April 14, 1999, Mr Petit filed a complaint with the Occupational Safety and Health Administration ("OSHA") alleging that he was fired in retaliation for his refusal to drive a truck he felt was unsafe. A complaint was also filed with Iowa Workforce. Both the State of Iowa and OSHA investigated the matter. On July 14, 1999, a Secretary's Findings and Preliminary Order was issued by

the OSHA Regional Administrator, finding that no violation of the STAA had occurred, based on its investigation. (C-2). OSHA found that Mr. Petit had quit his job without allowing sufficient time for Respondent to correct the problems with Truck 215, and that American had not violated § 405 in firing Mr. Petit for legitimate business reasons. (C-1).

On April 28, 1999, Iowa Workforce also contacted Respondent in a separate investigation. American responded to the complaint in a timely fashion, and, although Mr. Petit objected to the finding, the Iowa Occupations and Safety and Health agency ("IOSH") closed the complaint as "corrected." (C-3).

By letter of August 16, 1999, Mr. Petit objected to the findings of the Regional Administrator, and sought a hearing on the matter. That hearing was held on November 15, 1999, in Des Moines, Iowa. The record was held open for filing of briefs, due thirty days after receipt of the Transcript. Extension was granted due to delays in obtaining copies of the Transcript, and the record closed on April 3, 2000, with the receipt of briefs.

## Findings of Fact and Conclusions of Law

All Administrative Law Judge ("ALJ") decisions in STAA proceedings are recommended. Moravec v. HC. & M Transportation. Inc., 1990-STA-44 (Sec'y Jan. 6, 1992). All portions of an ALJ's order except for an order of reinstatement are stayed until reviewed by the Secretary of Labor; the Secretary reviews the ALJ findings under a "substantial evidence" standard. 29 C.F.R. § 1978.109(b)(3). The Secretary's Findings and Preliminary Order, the appeal of which led to these proceedings, however, has no evidentiary weight, as the ALJ hearing is a *de novo* proceeding. Holloway and Murray v. Lewis Grocer Co., 1987-STA-16 (Sec'y Jan. 25, 1988), *aff'd in relevant part*, 874 F.2d 1008 (5th Cir. 1989).

The Complainant bears the burden of establishing a *prima facie* case under the STAA in order to proceed.[1] The elements of such a claim must be proven by a preponderance of the evidence, and are 1) Complainant is engaged in a protected activity under the STAA, 2) Complainant was subject to an adverse employment action, and 3) there was a causal link between the employment action and the protected activity. The third element is also deemed met if it is shown that the employer knew of the protected activity when the adverse employment action was taken; it is inferred that there is a causal relationship. Osborn v. Cavalier Homes of Alabama. Inc. and Morgan Drive Away. Inc., 1989-STA-10 (Sec'y July 17, 1991). Once a

[1]It has been held that when a case proceeds to a full evidentiary hearing, the *prima facie* analysis is irrelevant, Ass't Sec'y & Ciotti v. Sysco Foods Co. of Philadelphia, 1997-STA-30 (ARB July 8, 1998), and the question to be addressed is whether the complainant proved by a preponderance of the evidence that the employment action was motivated by protected activity. Pike v. Public Storage Companies, Inc., 1998-STA-35 (ARB Aug. 10, 1999). However, although in the final analysis I have addressed that question, I have found it helpful in this case to use the *prima facie* procedure.

complainant has established his or her prima facie case, the Employer has the opportunity to produce a neutral, nondiscriminatory reason for the employment action which is unrelated to the protected activity. In dual motive cases, an employer must show that the action would have been taken regardless of the protected activity in order to meet its burden. Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989). If the employer can produce a neutral reason, the burden of production shifts back to the complainant to establish by a preponderance of evidence that the adverse employment action was retaliation motivated by the protected activity. Clean Harbors Environmental Services. Inc. v. Herman, 146 F.3 )d 12 (IS` Cir. 1998); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The burden of persuasion, however, never shifts; the complainant always bears the burden of proof by a preponderance of the evidence.

**Complainant's Prima *Facie* Case**

A refusal to operate a vehicle because of a reasonable apprehension of serious injury to either the driver or the general public as a result of the unsafe condition of the vehicle is protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii). It is clear that Mr. Petit refused to drive Truck 215 due to his safety concerns. Before operating the truck for the first time, he was aware that the speedometer and tachometer were not functioning (T 31), and upon driving the truck discovered that the brakes lacked full stopping power and made a noise like an air valve was not working properly. (T 33). Further, the turn signals were not working correctly. It is unclear from the record exactly what the malfunction with the directionals was; they may have been working outside the truck, but caused blinking of other lights in the cab. (T 34). Finally, Mr. Petit complained that a fire extinguisher was loose in the cab, the boot around the gear shift had been replaced with a rag or old shirt, the dashboard was cracked, the truck was generally dirty, and the heat and air conditioning were not working.

I find that, based upon the inoperable tachometer and speedometer, as well as the discovery of the faulty turn signals and suspect brakes, Mr. Petit's apprehension was reasonable. The other problems noted above would not have constituted reasonable grounds for a refusal to operate. While they may have been violations of the applicable regulations, I find that a fear that such posed a threat of serious injury was not reasonable. There is no allegation that the dirt curtailed the driver's vision, and, with the exception of the unmounted fire extinguisher, the allegations relate more to the Complainant's comfort than his or the public's safety. Mr. Petit admitted as much during the hearing. (T 45). I raised the reasonableness of refusal based upon the loose fire extinguisher at the hearing, and Mr. Petit explained that securing equipment was necessary in case of an accident. In brief, Complainant points out that accidents have occurred when loose items, such as disposable cups, have become lodged under the pedals. I find, however, that the events needed to make the fire extinguisher a threat to safety are so remote as to make refusal on that ground unreasonable. Finally, although Mr. Petit is adamant in stating that the failure to mount the extinguisher is a violation of federal regulations, I find his refusal to drive was based primarily on the brakes and to a lesser degree on the faulty turn signals and broken speedometer. I find that he did not communicate those lesser concerns to American at the time of his refusal, however. The record is unclear as to whether he expressly included a complaint regarding the fire extinguisher when speaking to Respondent's representatives on March 23 and 24.

The second element of a *prima facie* case is an adverse employment action be taken. Mr. Petit has alleged that he was told by Mr. Jeff Tucker on the morning of March 24 to drive Truck 215 or to find another job. He felt at this point that he had been fired. Further, even if Mr. Petit was not fired at that time, he was admittedly later terminated by American. (C 1). This is an adverse employment action. Under either version of events, the second element has been met.

Finally, a complainant is required to show a causal link between the employment action and the protected activity. This is not a heavy burden to meet, and may in fact be met by inference when the action follows the activity, and the Employer had knowledge of the protected activity. It is not necessary to infer anything here, however, as Mr. Petit has testified that in a conversation with Mr. Tucker, the dispatcher, he was fired for his refusal to operate Truck 215. Specifically, he states that he was told he either had to drive the truck or find another job. (T 69). At this point, Mr. Petit considered himself fired. Clearly, the refusal precipitated the firing, and the third *prima facie* element is met.

With the establishment of a *prima facie* case, as discussed above, the burden of production shifts to American to offer a legitimate, non-discriminatory reason for the adverse employment action.

**Employer's Nondiscriminatory Reason**

It is error to consider the Respondent's reasons for the discharge during the discussion of the *prima facie* case. Auman v. Inter Coastal Trucking, 1991-STA-32 (Sec'y July 24, 1992). Only at this point in the proceedings may an employer's arguments be considered, as they are beyond the *prima facie* issue of causation, and more squarely address the ultimate issue of fact whether the respondent retaliated against the complainant for protected activity. Long v. Roadway Express, Inc., 1988-STA-31 (Sec'y Sept. 15, 1989), *affd sub nom.*, Roadway Express, Inc. v. Dole, 929 F.2d 1060 (5th Cir. 1991).

American's offered reason for firing Mr. Petit is that the Complainant quit. Contrary to the account of the Complainant, American maintains that during all conversations with Mr. Petit on March 23 and 24, it was made clear that Truck 215 would be repaired, and he was asked if he would drive the truck then. Mr. Tucker's statement regarding finding other work, he explained, was not accurately reported by the Complainant. He was actually told to find other work only if he refused to drive Truck 215 after it was repaired, as no other vehicles were available for him to operate. (T 126). Further, the Complainant indicated "he wanted nothing to do with that truck." (T 121). Later in the day on March 24; when Complainant called Mr. Jungbluth, he was asked specifically if he would drive Truck 215 under any circumstances. According to Respondent, Mr. Petit agreed to drive the truck only if it was repaired "to his specifications," which American maintains would involve making the truck like new. Repairs would have to be made to the air conditioner and heater, and the truck cleaned, aside from the repairs to brakes and turn signals. (T 99). Respondent agreed to repair the truck to make it safe to drive; it is unclear if that included remedying all of Mr. Petit's complaints. However, Complainant never returned to work, or contacted Respondent, and he was considered to have quit. (T 102).

**Complainant's Case-ln-Chief**

Once Employer has enunciated a legitimate and non-discriminatory reason for the adverse employment action, the Complainant must again bear the burdens of production and persuasion, and demonstrate that the adverse employment action taken against him was retaliation for his protected activity.

The STAA offers protection under two main sections. The first, § 31105(a)(1)(A), provides that an employer may not discharge, discriminate against, or discipline an employee for the filing of a compliant or start of a proceeding regarding a safety violation. As American points out, at the time of the events at issue here, no formal proceedings or compliant had been instituted, and so § 31105(a)(1)(A) is inapplicable. Instead this is a "refusal to drive"case under 49 U.S.C. § 31105(a)(1)(B), which does not require formal action other than a refusal to drive. Subsection (B) provides that:

> "(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because-...
>
> (B) the employee refuses to operate a vehicle because-...
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."

Protected Activity Triggering the Protection of the STAA

Contrary to the assertions of Respondent, there is no formal reporting requirement contained in the STAA. Under the case law, the sole requirement is that of communication of the refusal to drive based upon safely concerns. Certainly it is an excellent idea to have in place procedures ensuring that American becomes aware of problems with its equipment, but it is not required that a complainant fill out a certain form in order to trigger a valid refusal to drive. *See, e.g.*, LaRosa v. Barcelo Plant Growers, Inc., 1996-STA-10 (ARB Aug. 6, 1996)(holding that a phone call to the dispatcher would have been sufficient as a refusal to drive if it was clear that safety concerns were discussed.). Moreover, it is clear from the record that a written, formal report is not necessary at American in order to report safety problems, and therefore any contention that there was an inadequate refusal to drive based upon a lack of a written report must fail.

The company handbook, read by Complainant, states that employees should "make sure that problems get reported to the proper person, whether that means your plant manager or shop supervisors." (T 52). Mr. Petit interpreted "report" to mean "notify," which encompassed oral reports. He was aware of the forms the company provided, but also knew that oral reports were also accepted. (T 53, 63). Mr. Jungbluth apparently agreed with this interpretation. "[T]he normal procedure was to fill

out the daily inspection sheet and turn it in. There were other times when [drivers] did verbally notify us of [problems], and they were taken care of." (T 10 1). American's mechanics relied on verbal reports as well. (T 138, 144). The written response to Iowa Workforce also indicated that the oral complaint was sufficient to notify the employer of safety problems with the truck. "I found that we have received one complaint, on March 24, 1999, from an employee about a truck in the condition alleged." (C 3). Further, Mr. Jungbluth took issue with none of Mr. Petit's allegations regarding his refusal to drive or the condition of the truck. (T 114). In fact it was established that Truck 215 was never driven again, and was traded in on April 21, 1999. (T 145, C 3). Respondent did dispute the claim that Complainant had been fired. I find that Mr. Petit informed Mr. Tucker, both on March 23, 1999, and again on March 24, 1999, of his refusal to drive based upon his safety concerns regarding the brakes on the truck. Therefore, I find that Mr. Petit adequately communicated his refusal to drive based on safety concerns to American, and he was therefore engaged in protected activity.

I adopt my analysis of the reasonableness of Mr. Petit's refusal as discussed in the *prima facie* section of this Recommended Decision and Order. I find that the refusal, based upon the condition of the brakes, was reasonable. A lack of stopping power presents a very real danger to both the driver and the general public, especially when the vehicle in question is traveling highways at speeds of 55 or 65 miles per hour. (T 33).

Further, I find that the evidence supports a finding that Mr. Petit's refusal to operate Truck 215 also falls within the provisions of § 31105(a)(1)(B)(i). The refusal, as discussed above, was based upon faulty brakes. American's head mechanic, during my questioning, stated at the hearing that operation of the truck with faulty brakes is a violation. (T 140). It is true that the only evidence of the brakes being bad is the testimony of the Complainant. He testified that the brakes lacked stopping power, and that they made a noise like an air valve was malfunctioning. However, this testimony is uncontradicted by American, and in fact the circumstances support a finding that there was a safety violation. American parked the truck and did not fix it, which clearly indicates that there was indeed something wrong with it. Moreover, American's representatives have testified that the only problem they were clearly informed of was that with the brakes; it must therefore have been the reason for taking the truck out of service. Finally, the truck was traded in and replaced. Combined with the undisputed complaints, and admitted relative age of the truck, the reasonable inference can be drawn that a safety violation was present. The brakes were not functioning properly, as the applicable regulations require. 49 C.F.R. §§ 393.40, 393.52.

Adverse Employment Action

The main point of contention between Complainant and Respondent is the manner of his departure from American. The former maintains he was fired on March 24, 1999, during his conversation with Jeff Tucker, while the latter claims to have never fired him; he quit on March 24, 1999. This is entirely a credibility question. Each has a similar account of the telephone conversations of March 24, but the differences are of major importance.

All agree that Mr. Petit refused to drive the truck in the condition it was in on March 24, 1999,

and that he cited safety concerns for that refusal. He may or may not have also mentioned items going more to the comfort of the driver, such as the air conditioning, but as I have found they were not the basis of the refusal, they will not be discussed herein. According to Mr. Petit, he was told by the dispatcher, Jeff Tucker, that if he refused to drive Truck 215, he should find another job. Mr. Tucker maintains that this is incomplete, and that he specified that if the refusal followed the repair of the truck, Complainant would be fired. Similarly, when Mr. Petit called later in the morning and spoke to Mr. Jungbluth, American argues that an offer to repair the truck was made, and he was specifically asked if he would drive the truck if it was repaired. Mr. Jungbluth reported that Mr. Petit would agree to drive a truck repaired "to his specifications." Mr. Petit, however, does not recall such an agreement. When asked what Mr. Jungbluth's response was to his call, Mr. Petit stated, "Well, there was a few words, I don't just remember exactly what was said." Under cross-examination, some confusion arose. While counsel for Respondent did ask about the agreement to drive Truck 215 if it was repaired to Mr. Petit's "specifications," he referred only to "your discussion on the morning of March 24 with a company representative ...." It is unclear whether the conversation referred to is that with Mr. Tucker, or that with Mr. Jungbluth. Further, Mr. Petit stated that he informed the company of what needed to be fixed, but gives no indication that the discussion involved returning him to work in a repaired truck. Again, I cannot discern which conversation is being referred to in either instance, or even if they are the same conversation.

I find that Mr. Petit is a credible witness, and place greater weight upon his account of both conversations. I find that there are a number of inconsistencies in the testimony and exhibits presented on behalf of American, and must afford Respondent's evidence lesser weight, and therefore find that Mr. Petit was fired on the morning of March 24, 1999, during his conversation with Mr. Tucker.

First, Mr. Tucker has testified that he told Mr. Petit that he should look for another job only if he refused to drive Truck 215 after it was repaired. However, his recollection is demonstrably flawed as regards other conversations with Mr. Petit, and so I afford his version of events less weight. Mr. Tucker recalled that the conversation of March 23, 1999, when Complainant first refused to drive Truck 215, took place over the phone. However, both Mr. Petit and Mr. Terry Thomas, American's head mechanic, testified that this was a face-to-face meeting. Complainant returned the truck to the North Plant, and went into the office to speak with the dispatcher. Mr. Tucker insisted, even when prompted, that no in person exchange occurred.

Second, the testimony of American's representatives is at direct odds with the response American filed, over the signature of Mr. Daniel Jungbluth, with Iowa Workforce. "Further, upon receiving this driver's complaints, we immediately took steps to rectify all defects that affected the safe operation of that vehicle before placing it back in service." (C 3). However, Mr. Jungbluth testified at the hearing that no repairs had been made to Truck 215, or even attempted. (T 101, 102, 104). Mr. Tucker did not recall if any repairs were scheduled on the truck. (T 125). The head mechanic, Mr. Thomas, stated that Truck 215 was parked and not driven again. (T 145). It was never repaired because there was no one to drive it. (T 148). This inconsistency is especially important in my assignment of weight because both the statements were made to government entities in the course of defending American, and represent positions which, in the context of the inquiry, place American in the

best light. Iowa Workforce is mainly concerned with the conditions of the truck, and was told that repairs were made. My inquiry is aimed at the employment action, and testimony before me indicates no need to repair because Mr. Petit had quit.

§ 31105(a)(2): Opportunity to Repair

Subsection (a)(2) provides that when the basis of the employee protection is a refusal to drive due to reasonable apprehension of serious injury, "the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition." 49 U.S.C. § 31105(a)(2). American argues that the Complainant did not seek repair of the condition, and therefore is not protected by subsection (a)(1)(B)(ii). I agree, and find that Mr. Petit did not seek to have Truck 215 repaired. He testified that he refused to drive the truck, and asked for another vehicle. At the point at which I have found he was fired, the Complainant, by his own testimony, did not raise the possibility of repairing and returning to the road Truck 215. "Correction of the unsafe condition" refers, I find, to the condition of Truck 215, not the removal of an unsafe truck from the road. Mr. Petit did not perform the action required to trigger protection under § 31105(a)(1)(B)(ii).

However, the requirement that an employee seek the correction of the unsafe condition does not apply to § 31105(a)(1)(B)(i), a refusal to drive based upon a safety violation. I have previously found that there were faulty brakes on Truck 215. American has presented no evidence to refute the allegation that the condition of the brakes violated the safety regulations; Mr. Thomas stated that faulty brakes were a safety violation. The regulations at 49 C.F.R. §§ 393.40 and 393.52 provide that braking systems meeting certain standards are indeed required. Mr. Petit's refusal to drive was based upon the brakes not being adequate, an allegation he made based on his extensive experience as a driver (T 18, 33, 88) and which has not been rebutted. Therefore, the protection under the STAA is still effective.

Causation

The crux of any claim under the STAA is the causation element of a claim. "The relevant inquiry is whether [the complainant] established, by a preponderance of the evidence, that the reason for his discharge was his protected safety complaints." Pike v. Public Storage Companies. Inc., ARB No. 99-072, ALJ No. 1998-STA-35 (ARB Aug. 10, 1999). I find that, based upon the conversation between Mr. Tucker and Mr. Petit, it is clear that Complainant was fired because of his refusal to drive Truck 215. Because of the many inconsistencies in the testimony of American's witnesses, and the contradictions between testimony and Complainant's Exhibit 3, I credit more heavily the account of Mr. Petit. He was told that if he refused to drive Truck 215, he should look for another job. That refusal was protected activity, and Mr. Tucker discharged him for it.

Further, I note that the Respondent has not truly contested the causation element of the claim. Rather, American argues that the refusal and termination of employment were related, but the termination was not a firing; Mr. Petit quit after he declined to drive a repaired truck. For reasons discussed above, I find that this argument fails. Mr. Petit was fired on the morning of March 24, 1999

by Jeff Tucker.

## Remedy

The STAA provides for remedies under 49 C.F.R. § 31105(b)(3)(A). These include ordering that an employer take affirmative action to remedy any violation, reinstatement of the complainant, and compensatory damages such as back pay. Additionally, upon the request of the complainant, the reasonable costs of litigation, including attorney's fees may be awarded. 49 C.F.R. § 31105(b)(3)(B).

When questioned regarding his desire to be reinstated to his former position, Mr. Petit was equivocal. "Would you go back to work for American Concrete if they offered you a job?...Depending on the timing, Your Honor. I mean, I'm working right now, but ...." (T 116). In his statement to OSHA, however, he expressed the desire to be reinstated. (C 2). Therefore, because no contrary desire has been clearly expressed, and in compliance with the mandatory language in § 31105(b)(3)(A), I order Mr. Petit immediately reinstated to his position as a driver at American immediately. 29 C.F.R. § 1975.109(b).

The question of compensatory damages is complicated by the fact that there is a dearth of evidence regarding wages, benefits, or other damages in the record. The statement of Mr. Petit (C 2) says "My pay was agreed upon at 90% of $12.60 per hour for the first 90 days of employment." (C 2). This information is not contradicted by Employer, and I therefore find that at the time of his hiring on March 10, 1999, Complainant's wage was $11.34 per hour; this wage would increase to $12.60 on June 8, 1999.

Further, Mr. Petit testified that the normal start time for the work day at American was 6:45 a.m. (T 20) and that the day typically ended at approximately 5:00 p.m.. (T 19). This is a nine hour day, even if a lunch hour is subtracted. American offered no evidence in contradiction to this description of the working hours. Further, I find that the testimony, although the point is not directly addressed, indicates that Mr. Petit was working a full work week, or 5 days per week. Where there is an uncertainty in the calculations, the issue is resolvable against the discriminating party. Kovas v. Morin Transport. Inc., 1992-STA-41 (Sec'y Oct. 1, 1993). The Complainant had ridden with another driver as a trainee for four or five days (T 14, 55), and then had driven another truck on his own for "a week, a week-and-a-half." (T 15, 57). Therefore, because the average work day is nine hours, the work week is 45 hours. I note that there has been no mention of overtime pay.

Further, it is clear that American's business is seasonal in nature, and that Mr. Petit was hired as part of the re-opening of business after the winter construction lull. (T 134, 143). American's business picks up greatly in March each year, and slows again with the arrival of winter towards the end of November. (T 143). Moreover, Mr. Petit also testified that he drove trucks part-time, when he was not farming (T 79); because of the number of days he worked during his first two weeks with American, I find that this means he did not work as a driver during the winter layoff. This conclusion is supported by the fact that at the time of the hearing, in mid November, Mr. Petit testified that he had another driving job. (T 116).

Exactitude in the calculation of back wages is not required. Lederhaus v. Paschen, 1991-ERA-13 (Sec'y Oct. 26, 1992). Based upon the reasonable presumption that the average work week of Complainant was 45 hours, the weekly wage of Mr. Petit was $510.30 for the first 90 days of employment, and $567.00 after June 8, 1999. American must pay back wages to Mr. Petit from March 24, 1999, the date of his unlawful retaliatory termination, until he is reinstated. As of April 28, 2000, I calculate that amount to be $23,088.24.[2] An offer of reinstatement, even if declined, will toll the accumulation of back pay.

This amount is to be offset by any amounts earned by the Complainant during the period from his termination to his reinstatement. A back pay award is offset by a complainant's interim earnings in positions he or she could not have held had his or her employment with Respondent continued. Nolan v. AC Express, 1992-STA-37 (Sec'y Jan. 17, 1995). This means that an offset only applies to wages earned while Mr. Petit would have been employed by American, during the March to November period. Wages earned at times when American would not have been paying him, from December to February, are not part of the offset. Specifically, the wages earned by Mr. Petit in his new truck driving job are to offset any award in this case, but his farming wages shall not be so used.

There is no claim in the record for lost benefits or other compensation.

Finally, Mr. Petit is entitled to pre judgement interest on the amount of any back wages received pursuant to a final order in this case. The Secretary will provide for such under 26 U.S.C. § 6621. Phillips v. MJB Contractors, 1992-STA-22 (Sec'y Oct. 6, 1992).

No fee petition has been received in this case; Complainant's counsel shall file such, if desired, within 30 days of the receipt of this decision. Once a fee petition has been filed, Respondent shall have 15 days from the date of receipt to file any objections thereto.

## Order

1. Respondent shall immediately reinstate the Complainant.

2. It is recommended that Respondent pay to Complainant back wages at the rate of $11.34 per hour for the period of March 24, 1999 to June 8, 1999, and $12.60 per hour for all days thereafter in American's work year, until Complainant is reinstated to his former job. As of April 28, 2000, such amount is $23,088.24. The amount of any offset, if any, due Respondent must be determined.

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[2]This figure is based upon a work year running from mid-March to late November each year, in accordance with the testimony. (T 143). From March 24 to June 8, 1999, there are 10.8 weeks, paid at the rate of $510.30. From June 9 to November 24, 1999, there are 24 weeks, paid at the rate of $567.00. ' Further, I assume that employment would have restarted at approximately the same time in 2000, on March 13, 2000. There are 7 weeks until April 28, and these would also be paid at the rate of $567.00. (10.8 x 510.30) + (24 x 567) + (7 x 567) = 5,511.24 + 13,608 + 3,969 = $23,088.24.

3. Complainant's counsel shall file a fee petition within thirty days of receipt of this Recommended Decision. Respondent shall file any objections to the same within 15 days thereafter.

John C. Holmes
Administrative Law Judge